NO. 83-712

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

_____o_____

STATE OF NEW JERSEY

Petitioner,

v.

T.L.O., a Juvenile

Respondent.

_____o_____

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NEW JERSEY

_____o_____

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

_____o_____

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INTEREST OF AMICUS CURIAE

The Los Angeles County Public Defender's Office is the largest such office in the United States. This Office represents minors alleged to be juvenile delinquents because of the commission of acts which would be criminal offenses if committed by adults. Therefore, the ultimate issue in this case, i.e., the standard for admissibility of evidence seized in searches by public school officials, is of great importance to this Office.

Additionally, we are currently counsel for appellant in In re William G., Crim. No. 22945, which is currently pending before the California Supreme Court. That case involves the same issue as the case at bench, and this court's resolution of the issue herein presented may prove critical in that matter.

During the briefing of In re William G., amicus developed the approach proposed in this brief, an approach endorsed by the American Bar Association, which has not been raised by any party or other amicus. Amicus feels that the approach proposed herein has substantial merit, and reconciles the many conflicting legal theories and interests, and is worthy of this Court's consideration.

INTRODUCTION

> "The guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."

This sentiment, penned by then Judge John Paul Stevens in his dissenting opinion in United States v. Barrett 505 F.2d 1091, 1114-1115, (7th Cir. 1975), remains as major a concern today as it was then and is the primary reason that this Court should rule that public school

students are protected by the search and seizure provisions of the Fourth Amendment while on school campuses. It is temptingly simplistic to say that restricting the Fourth Amendment protections afforded public school students will curb violence and drug abuse in public schools; indeed, elimination of the Fourth Amendment protections of all citizens might lower overall crime rates. However, experience has shown that the government must be restricted in its power to invade the privacy interests of its citizens to avoid unjustified intrusions on the innocent as well as the guilty.

An examination of the civil cases dealing with public school searches leads to the inescapable conclusion that abuses by public schools are already wide-spread. For example, Bilbrey v. Brown ___ F.2d

___ (Case No. 81-3008) (9th Cir. 1984), a fifth grade student was subjected to a strip search after a school bus driver, with what the court found to be little justification, thought that student and another were exchanging marijuana -- the record indicated that they were exchanging bubble gum. In the pending case of Estell v. Ford (Case No. 84-6033, W.D. Ark.), it is alleged that a school district has adopted a policy requiring a high school student to submit to either a blood, urine, breath or lie detector test at the command of any school official. A student's refusal to submit to such a test leads to the same consequence -- either suspension or expulsion from school --as a finding that the student has violated the drug or alcohol policy of the school.

In Doe v. Renfrow, 475 F.Supp. 1012

(N.D. Ind. 1979), aff'd in part 631 F.2d 91, Rehrg. denied 635 F.2d 582, cert. denied 451 U.S. 1022, an entire student body was subjected to being sniffed by police dogs trained to detect illicit drugs. Following this general examination of the 2,780 students at the school, several were taken out of class and subjected to nude strip searches. Of the 50 who were subjected to such searches, only 15 were found to possess contraband. Diane Doe, was apparently subjected to a strip search after a dog mistakenly reacted to her because she had been playing with a family pet which was in heat.

While the abuses shown by these cases, and many more demonstrate the need for application of the Fourth Amendment's protections to school searches, the case at bench raises the further issue of what

standards are to be applied in ruling on the admissibility of evidence seized by school officials. As will be demonstrated, while it may be reasonable that Fourth Amendment standards be relaxed somewhat to allow schools to search for the purposes of internal discipline and order, there is no legal reason for such relaxed standards to be applied when the fruits of such a search are offered at a criminal or quasi-criminal trial.

PROPOSED RULE

Therefore, Amicus proposes that this Court adopt a two-tiered approach to reviewing searches of students on public school campuses. On the first tier, searches conducted solely for the purposes of enforcing school rules and regulations would be legal if supported by a reasonable suspicion that the student to be searched violated a school rule or

regulation. On the second tier evidence seized in such a search would be admissible at a criminal or juvenile delinquency proceeding only if the search was supported by the same probable cause required in searches by police officers.

This proposed rule is fashioned after Standard 8.6 of the American Bar Association Juvenile Justice Standards, Standards relating to Schools and Education. The proposed rule differs from Standard 8.6 only in that it would flatly prohibit the introduction of evidence seized without probable cause whereas the A.B.A. proposal would create a presumption that the probable cause standard should apply if such evidence is proffered at a criminal trial. The presumption approach not only places unnecessary burdens on trial courts but is also inconsistent with the applicable

law related to the status of school officials. However, the basic thrust of the A.B.A. proposal, that searches which result in prosecution be treated differently than searches which result only in school discipline, is valid in that it recognizes the differences between the two types of proceedings and accommodates those competing interests. The rule proposed by amicus serves both interests as well and more easily accommodates the legal theories involved.

I

THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITED THE SEARCH IN THE CASE AT BENCH

INTRODUCTION

The relationship between public schools and their students is very complex. It is clear that the schools are arms of the government in that teachers

are public employees, subject to certification and licensing restrictions imposed by the state, schools are financed by the state, and students are compelled to attend by state law. Yet, it is equally clear that school's function is to educate children, and they must be able to exercise control over them to maintain reasonable order and facilitate the education process. (See Bahr v. Jenkins, 539 F.Supp. 483 at 487 (ED.Ky. 1982).) This schizophrenic relationship between students and public schools leads, on occasion, to conflicts such as in the case at bench, in which the actions of the school transcended those of a teacher and educator and became those of a policeman. Therefore, amicus contends that the school's actions had to be supported by probable cause.

A The Fourth Amendment applies to the search in the case at bench.

As this Court recently noted in Oliver v. United States, (1984) ___ U.S. ___, [104 S.Ct. 1735], the "touchstone" of Fourth Amendment analysis is the question of whether an individual has a reasonable expectation of privacy which is invaded by the government's search. This expectation of privacy must be both subjectively held and objectively reasonable.

There can be no question but that T.L.O. subjectively believed that the contents of her purse would remain private. Petitioner does not even attempt to argue to the contrary. The issue becomes, then, whether T.L.O.'s belief in the privacy of the contents of her purse was objectively reasonable.

Petitioner appears to contend that

students surrender their constitutional expectation of privacy when they enter public school campuses and cannot reasonably believe that they have such a right. This argument is based on an analogy to this Court's decisions in United States v. Biswell (1972) 406 U.S. 311; Donovan v. Dewey (1981) 452 U.S. 594; and Colonnade Catering Corp. v. United States (1970) 397 U.S. 72. These cases are inapposite to the matter at bench. In Biswell, this Court held that an individual who voluntarily entered into business as a firearms dealer had a diminished expectation of privacy because of his involvement in a highly regulated industry with knowledge of the regulators. Similarly, in Colonnade Catering this Court ruled that an individual has who is a licensed alcohol dealer has a diminished expectation of privacy because

he voluntarily enters into a regulated business. The same result was reached and reasoning employed in Donovan v. Dewey which dealt with highly regulated rock quarries.

The rule that such warrantless searches are justified by the fact that persons who enter into highly regulated industries choose to do so with the knowledge that they have a diminished expectation of privacy in their businesses is not applicable to school grounds searches. Students are compelled by law to attend school. Therefore, it cannot be said that they voluntarily enter into a situation in which they knowingly surrender their search and seizure rights. The requirements of compulsory education laws are often cited as factors distinguishing school searches from other types of searches (such as

airport or border searches) in which individuals voluntarily place themselves in a position in which they have a diminished expectation of privacy. (E.g., Jones v. Latexo Independent School District, 499 F.Supp. 223, 234 (E.D. Tex. 1980.) Certainly students cannot be deemed to have waived their search and seizure rights as a condition of exercising their rights to a free education. (Morale v. Grigel 422 F.Supp. 988, 999 (D.C.N.H., 1976), Moore v. Student Affairs Committee of Troy State University, 284 F.Supp. 725 (M.D.Ala. 1968), Smyth v. Lubbers, 398 F.Supp.777 (W.D.Mich. 1975).)

Schools are unique in our society in that they are the only non-penal institutions which citizens are required to attend. According to petitioner, minor-students surrender their right to be

protected from unreasonable official searches and seizures leading to criminal proceedings. If this is so, schools will join jails as the only involuntary institutions in which the probable cause requirement does not exist. Even searches on military bases must be based on probable cause. (United States v. Audain (ACMR 1980) 10 M.J. 629, 630-631; United States v. Corkill (CGCMR 1976) 2 M.J. 1118, 1120; Larkin and Munster, "Military Searches and Seizures" (1976) 29 JAG Journal 1.) Thus, students on public school grounds must have some reasonable expectation of privacy.

Recent opinions from some Justices of this Court suggest that even a reasonable expectation of privacy may not protect all sorts of property against governmental search. For instance, Oliver v. United States, supra, this

Court discussed the applicability of the Fourth Amendment to open fields when the owner of those fields took action to manifest an expectation of privacy. In the portion of the majority opinion in which Justice White joined, it was noted that the Fourth Amendment's language protected only "persons, houses, papers and effects," and that "effect" would generally be interpreted to include personal property. (35 Cr.L. 3013, fn. 7.) However, this case involves a purse, exactly the type of personal effect which would be protected by the Fourth Amendment under Oliver.

B Even if respondent's status as a public school student diminishes her expectation of privacy for school discipline searches, the Fourth Amendment bars admission of evidence seized without probable cause in criminal or quasi-criminal proceedings.

Although this Court has never ruled

directly on the applicability of the Fourth Amendment to public schools, it has examined the relationship of other components of the Bill of Rights to public schools on several occasions. In West Virginia State Board of Education v. Barnette (1943) 319 U.S. 624, this Court ruled that public school students could not be compelled to recite a flag salute, based on a recognition that compulsory recitation of a flag salute was inconsistent with both the rights to freedom of speech and freedom of religious belief. This Court ruled that the state, through its public schools, was not free to interfere with constitutionally protected rights absent some evidence that interference was necessary to avoid a "clear and present danger" to the operation of the school. (319 U.S. at pp. 633-634.)

In Tinker v. Des Moines Independent Community School District (1969) 393 U.S. 503, this Court ruled that public school students could not be prohibited from wearing black arm-bands to protest the Vietnam war. In so ruling, this Court limited the school's power to infringe on students' constitutional rights to those restrictions necessary to insure safety on school grounds. Prohibiting black arm-bands was found to be an infringement on freedom of speech not supported by any need to maintain discipline and order on the campus.

The general rule that a student's constitutional protections are diminished on campus only to the degree necessary to maintain order on campus is consistent with the holdings of this Court on a minor's rights to privacy under the

Fourth Amendment. In both Planned Parenthood of Central Missouri v. Danforth (1976) 428 U.S. 52, and Carey v. Population Services International (1977) 431 U.S. 678, this Court ruled that minors are persons entitled to the privacy protections of the Fourth Amendment. This Court added a caveat that the state may restrict this privacy right in some instances due to the immaturity of children, but only when necessary to serve "a significant state interest. . . that is not present in the case of an adult." (428 U.S. 52, 75, 431 U.S. 678, 692, emphasis added.)

Admittedly, school discipline may support a diminution of minor's search and seizure rights. There is a substantial state interest in maintaining school discipline, and the consequences to the student are not terribly severe

in most cases. Certainly discipline of students is an interest which is not present in the case of an adult. However, this justification cannot support an attempt to extend it to criminal or quasi-criminal proceedings. While enforcement of criminal laws may be of substantial interest to the state, it is an interest which extends to both adults and minors. There is no distinction which would support a diminution of minor's right to privacy.

In Ingraham v. White (1979) 430 U.S. 651, this Court examined the use of corporal punishment, as a disciplinary measure, in the public schools. The attack on the use of punishment was two-fold: it constituted cruel and unusual punishment, and students were denied due process when such punishment was imposed without notice or a hearing. In holding

that corporal punishment, imposed as a means of school discipline, did not constitute cruel and unusual punishment, this Court traced the history of the provisions of the Eighth Amendment, and noted that the cruel and unusual punishment restriction arose because of concerns regarding the rights and treatments of persons convicted of crime. This Court held that the cruel and unusual punishment limitation thus applied only to criminal proceedings. This Court noted exactly what amicus is urging: there is a difference between actions taken to advance the safety and discipline of the school and actions taken to begin or facilitate criminal prosecutions.

The case at bench is a quasi-criminal case, and amicus submits that the rule generally applied in such cases, i.e., that a search must be supported by

probable cause, must also be applied here. The fact that the search occurred on a public school ground cannot alter this result.

C <u>A public school official is a governmental agent for the purposes of the Constitution's limitations on searches and seizures</u>.

The search and seizure limitations of the Fourth Amendment to the United States Constitution apply only to searches conducted by the government or under the color of its authority. (<u>Burdeau</u> v. <u>McDowell</u> (1923) 256 U.S. 465. The governmental status of school officials has been the subject of considerable judicial debate. However, the modern trend has been to hold that public school officials <u>are</u> agents of the state for purposes of constitutional protections of individual rights. The "issue" of whether school officials are peace

officers is a "red herring", although some cases such as In re Guillermo M. (1972) 130 Cal.App.3d 642 have tended to draw this distinction for the purposes of search and seizure. The proper distinction to be drawn, however, is that between governmental agents and private citizens; the peace officer/private citizen distinction is too narrow and misinterprets the requirements of the constitution.

The constitutional limitations on searches and seizures do not operate only upon peace officers; they are restrictions on government as a whole. (Camara v. Municipal Court (1967) 387 U.S. 523; Marshall v. Barlow's Inc. (1978) 436 U.S. 307; G.M. Leasing Corp. v. United States (1977) 429 U.S. 338. As this Court stated in Griffin v. Maryland (1964) 378 U.S. 130;

> "If an individual is possessed of State authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action he took was not authorized by state law."

Public school officials clearly operate under color of governmental authority. In New Jersey, as in other states, their authority over students is derived from statute (N.J.S.A 18A:37-1, see also State v. Lonk (1982) 180 N.J. Super. 140, 434 A.2d 602.) Students are compelled by law to attend schools where such officials have authority over them (N.J.S.A 18A:38-25), officials use their statutory title and authority to place students in custody and transport them to the offices where searches occur and the actual searches generally take place in a governmentally owned and operated

facility: the public school.

Additionally, it is clear that school officials act to protect the interests of the public, rather than a private employer. School Districts and boards are creations of statute, and principals as well as teachers are employed by those districts under the authority of statute. (N.J.S.A. 18A:6-34; 18A:16-38; 18A:4-1; 18A:4-15; 18A:4-16; 18A:4-10, 18A:4-16.) Furthermore, the funding for public schools comes from public bonds and tax money (N.J.S.A. 18A:Chapt. 22 and 24) and the certification and employment of public school teachers are controlled by statute. (N.J.S.A. 18A:26-1 et. seq.)

Citing such factors, federal courts, beginning with this Court in West Virginia State Board of Education

v. Barnette (1943) 319 U.S. 624 1/, have universally held that school officials act in a governmental capacity for purposes of personal constitutional rights, including those of the Fourth Amendment. 2/ Most state courts which

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1 In West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624, this Court said:

> "The Fourteenth Amendment, as now applied to the States, protects citizens against the State itself and all of its creations - Boards of Education not excepted. These have, of course, important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." (319 U.S. 637, emphasis added.)

2 "As courts in most recent cases have decided, we think it beyond question that the school official, employed and paid by the state and supervising children who are, for the most part, compelled to attend, is an agent of the government and is constrained by the Fourth Amendment."
(Horton v. Goose Creek Independent School District, supra, 690 F.2d 470, 480.) (See also, Picha v. Wielgos, 410 F.Supp. 1214, 1217 (1976) Jones

have considered the question have concluded that public school officials are state agents for purposes of the Fourth Amendment and, where discussed, for the purposes of applicable state constitutional protections against unreasonable searches and seizures. (See, Doe v. State (1975) 88 N.M. 347, 540 P.2d 827, 831 (1975), D.R.C. v. State, 646 P.2d 252, 255 (Alaska 1982), Interest of J.A., 85 Ill.App.3d 567, 40 Ill.Dec. 755, 406 N.E.2d 958, 962 (1980), Interest of L.L., 319 S.2d 154, 156 (Wis.App. 1975), People v. D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 405 (1974), State v. Baccino, 282 A.2d 869, 871 (Del.Super. 1971) 3/, State v. McKinnon,

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v. Latexo Independent School District, 499 F.Supp. 223, 229, (E.D. Tex. 1980); Bellinier v. Lund, 438 F.Supp. 47, 50-52 (N.D. N.Y. 1977)

3 In State v. Baccino, supra, 282 A.2d 869, the court noted the numerous

88 Wash.2d 75, 558 P.2d 781, 783-784 (1977), State v. Walker, 528 P.2d 113, 115-116 (Or.App. 1974), State v. Young, 234 Ga. 488, 216 S.E.2d 586, 591 (1975).)

Although no California court has specifically so held, 4/ the clear implication of the California cases, with the exception of In re Donaldson (1969) 269 Cal.App.2d 509, 75 Cal.Rptr.220, is that California courts consider public school officials to be government agents

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cases in which school officials' actions wee considered state action for the purposes of civil rights actions pursuant to 42 U.S.C. 1983 and 1985 and concluded:

> ". . .it is difficult to see how a principal could also be a private person for the purposes of the Fourth Amendment at the same time. (282 A.2d 871.)

4 This question is currently pending before the California Supreme Court in In re William G., Crim. 22945.

for the purposes of search and seizure. In In re Thomas G., 11 Cal.3d 1193, 90 Cal.Rptr.361 (1970), the California Court of Appeal discussed the conduct of a high school principal and dean in Fourth Amendment terms and found it to be "reasonable". Similarly, in In re Fred C., 26 Cal.App.3d 320, 325, 102 Cal.Rptr.682 (1972), the Court of Appeal discussed the school official's conduct in terms of constitutional "reasonableness". In In re Christopher W., 29 Cal.App.3d 777, 782, 105 Cal.Rptr.775 (1973), the Court of Appeal couched its discussion in terms of the Fourth Amendment limiting the power to search under the doctrine of in loco parentis, although it finally suggested that, "high school personnel are not government officials for the purposes of the constitutional rules regulating police

conduct", in apparent contradiction of its earlier application of the Fourth Amendment.

1 The doctrine of In Loco Parentis may not change public officials into private citizens for search and seizure purposes

In In re Donaldson, supra, 269 Cal.App.2d 509, the California Court of Appeal ruled that public school officials were not governmental agents for the purposes of the Fourth Amendment but were, rather, private persons to whom the constitutional search and seizure restrictions did not apply. This theory which has been adopted in only one other jurisdiction, Texas (Mercer v. State, 450 S.W.2d 715 (Tex.Civ.App. 1970)), and, as discussed above, has been implicitly rejected by subsequent California cases, was based on the following logic:

> The common-law doctrine of in loco parentis is premised in

> part on the notion that parents delegate their authority over children. The schools then stand in the place of the parents (in loco parentis) who are private persons.

This theory has been universally criticized by commentators, being described as "inscrutable" by one. (Buss, The Fourth Amendment and Searches in Public Schools (1974) 59 Iowa L.R. 739, 766.) The basic problem with this reasoning is that it disregards both the theory behind the doctrine of in loco parentis and the realities of modern public education, not to mention the Constitution and subsequent codifications of the doctrine.

The doctrine of has two sources, common-law and statutory. The common-law doctrine was described by Blackstone as follows:

> "He [father or guardian] may also delegate part of his parental authority, during his

> life, to the tutor or schoolmaster, of his child; who is then in loco parentis (in the place of a parent), and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." (1 Blackstone's Commentaries 453.) 5/

Thus, the common-law doctrine of in loco parentis had two components: (1) delegation of authority from the parents to the school, and, (2) a limitation of authority vested in the tutor or schoolmaster to that which was necessary to facilitate the restraint and correction

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5 At least part of this common-law concept of the doctrine of in loco parentis lives on in the Restatement of Laws, Second. Restatement of Torts 2d, § 153 differentiates between the authority delegated by a parent and a public school teacher who has a somewhat broader authority to inflict punishment or discipline as may be necessary. (Compare, Rest.2d, Torts § 153, subd. (1) and § 153, subd. (2).)

needed to accomplish the purpose of education. (Comment: Constitutional Law - Search and Seizure - School Officials' Authority to Search Students Is Augmented by the In Loco Parentis Doctrine - Nelson v. State, 319 So.2d 154 (Fla.2d Dist. Ct.App. 1975); 5 Florida State L.R. 526, 6530 (1977).)

The passage of time and the advent of compulsory education laws have undermined much of the theoretical basis for the common-law definition of the in loco parentis doctrine. In most states, the first component, delegation, cannot be said to exist as parents are mandated by law to enroll their children in school. This has led at least one court to conclude:

> ". . .the phrase in loco parentis, used by Blackstone to described the relationship between teachers and students when education was predominately private and teachers

> could reasonably be viewed as the agent of the students' parents, has little utility in describing contemporary compulsory public education." (D.R.C. v. State, supra, 646 P.2d 252, 255.)

Many states, including New Jersey, sidestep the delegation problem by granting school officials certain statutory privileges to effectuate discipline. (N.J.S.A. § 18A:6-1; see also, 24 P.a. P.S. 13-1217; Calif. Ed. ode § 44807, Fla. Stat. 1983 §§ 232.26 and 232.27:) The statutory elimination of the delegation element of the common-law definition of the in loco parentis doctrine also undermines the foundation of such cases as In re Donaldson, supra. If, as the court in Donaldson theorized, school officials become private citizens because of the delegation of the parents' private citizen status, the elimination of that delegation eliminate the

basis for private citizen status. School officials now act pursuant to statutory, rather than delegated, authority. This, combined with the other indicia of state action discussed above, clearly put school officials within the constitutional definitions of state agents for the purposes of constitutional limitations of searches and seizures.

Additionally, when the common-law doctrine of in loco parentis evolved, education was a largely individual matter without the interstudent relationships inherent in large urban schools. (See, generally, Mawdsley, In Loco Parentis: A Balancing of Interests, Ill. B.J. 638 (1973).) Therefore, the disciplinary powers granted by the doctrine were for the benefit of the individual child, rather than for the protection of the whole of the student body. To stand in

the place of the parent meant to share the parents' concern for the welfare of the individual student and to exercise the power in the same way as the parent. (Comment: 5 Florida State L.R. 526, 531, see also, Rest.2d Torts § 153, subd. (1) and comment thereto.)

Therefore, the second component of the common-law concept doctrine is not present in modern public schools as they are less concerned with the individual student than with the protection of the student body as a whole. 6/

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6 This has led one commentator to note:

> "Insofar as in loco parentis sums up the peculiar school-student relationship and the school's related interest in searching students, it focuses almost entirely on protection of other students and on coercive power over the searched student. One of the things which makes in loco parentis such an erroneous phrase in this context is precisely the absence of a genuinely parental protective con-

As noted above, both the statutory and common-law doctrines of in loco parentis have a second restriction, that is, the action taken by school officials is limited to that necessary to maintain a proper educational environment. Simply stated, in the case a bench, that meant the school could remove T.L.O. and her marijuana from the campus. Reference for

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cern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate and permanent child parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules." (Buss, The Fourth Amendment and Searches of Students in Public Schools (1974) 59 Iowa L.R. 739, 768.)

criminal prosecution was not necessary to accomplish that goal. Under N.J.S.A. 18A:37-4 and 18A:37-5 the principal of a public school may summarily suspend a student immediately upon apprehension if that student is in possession of a controlled substance and the principal determines that such action is necessary for the safety of the school. Therefore, the function suggested by the in loco parentis doctrine would have been well served by the use of the disciplinary power provided by statute and prosecution was not necessary.

The absurdity of employing the doctrine of in loco parentis in the case of searches by public school officials is underscored by the obvious conflict between the "parent" function under the doctrine and the law enforcement function

of school officials. It would be unrealistic to expect that governmental agents employed as officials in a public school would exercise the same circumspection in notifying the police as a student's parent would. state appointed "parent" cannot dispassionately waive a student's privacy right when that very official is doing the searching.

These theoretical problems have led some courts to reject in loco parentis as a basis for searches conducted only for the purposes of school discipline. (E.g., Horton v. Goose Creek Independent School District, supra, 690 F.2d 470, 480-481, fn. 18.) These difficulties have led other courts to differentiate between searches conducted for the purpose of school discipline and searches which lead to evidence offered in criminal proceedings.

It has been often noted that the doctrine of in loco parentis does not confer powers which are coextensive with those of parents and cannot be allowed to transcend students' constitutional rights. (E.g., Picha v. Wielgos, supra, 410 F.Supp. 1214 1218-1219, Axtell v. La Penna 323 F.Supp. 1077, 1079-1080 (W.D. Pa. 1971).) It is clear that the doctrine serves as no impediment to declaring public school officials to be governmental agents for the purposes of constitutional limitations. Because of all of the indicia which indicate the public school officials act under the color of state law and for a state purpose, they should be declared governmental agents and held responsible for the search and seizure limitations.

II

PROBABLE CAUSE IS THE APPROPRIATE STANDARD FOR ADMISSIBILITY OF EVIDENCE IN JUVENILE COURT PROCEEDINGS

Many courts have recognized that school officials are government agents and subject to the constitutional limitations on searches and seizures, but have allowed school ground searches on a "reasonable suspicion", rather than the probable cause required in searches by police officers. (E.g., Doe v. State, supra, 88 N.M. 347, 540 P.2d 827, 832, State v. Baccino, supra, 282 A.2d 869, 871.) This lesser standard is imposed because of an application of the doctrine of in loco parentis, and the courts' feeling that balancing this doctrine and the responsibilities attendant to it against the privacy rights of minors justifies a lower standard.

(State v. Baccino, p. 871.) This might be a legitimate concern when the fruits of the search are used solely for school discipline, but the justification disappears when the fruits of such a search form the basis of a criminal or quasi-criminal prosecution, such as that in the case at bench.

At the outset, it cannot be denied that there is a substantial difference between school disciplinary proceedings and juvenile delinquency proceedings, which are quasi-criminal in nature. The most fundamental difference is the nature of the interest involved. While the right to a free education is not to be minimized, San Antonio School District v. Rodriguez (1973) 411 U.S. 1,18, 33-39, it has never been accorded the same importance as liberty, the subject of criminal and delinquency proceedings and

an interest which has been described as second only to life itself.

One need look no further than the required procedural protections to perceive the judicial recognition of the distinctions between school disciplinary proceedings and quasi-criminal delinquency proceedings. In In re Gault (1967) 387 U.S. 1, this Court mandated the right to counsel, the right to notice and an opportunity to prepare, the right to present a defense and the right to confront and cross-examine witnesses all be a part of the juvenile court process. In In re Winship (1970) 397 U.S. 358, this Court ruled that the Constitution required that the reasonable doubt standard used in criminal cases be applied to juvenile delinquency proceedings because:

> ". . .civil labels and good intentions do not themselves

> obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'" (397 U.S. 366-367.)

In contrast, in Goss v. Lopez, 419 U.S. 565, 579-585, 42 L.Ed.2d 751, 95 S.Ct. 729 (1979), this Court held that there is no necessity for preparation time, counsel, the right to call witnesses and the right to confront and cross-examine witnesses in minor disciplinary proceedings. In its opinion in John A. v. San Bernardino City Unified School District, 33 Cal.3d 301, 187 Cal.Rptr. 472, 654 P.2d 242 (1982), the California Supreme Court held that the evidentiary standard in expulsion hearings is a preponderance of the evidence (33 Cal.3d 307), restricted the scope of the right

to confront and cross-examine witnesses and held, implicitly, that there is no right to counsel. Clearly, these distinctions in the procedural protections reflect a recognition of the differences in the consequences involved in delinquency and disciplinary proceedings. Indeed, the distinction is so great that at least one court has indicated that there may be state action, bringing the Fourth Amendment into play, only in delinquency proceedings. (In Interest of L.L., 280 N.W.2d 343, 348, supra.)

The courts have generally allowed schools to handle discipline internally while delinquency is handled in the courts. Because school disciplinary proceedings are purely school affairs, with relatively minimal collateral consequences, it is appropriate to use the doctrine of in loco parentis, at least

as it is defined by statute, to allow schools to maintain order. However, there is no theoretical or practical reason for allowing the introduction of evidence seized in a search done on less than probable cause, pursuant to the doctrine of in loco parentis, in a criminal case. The school's actions in this matter exceeded the bounds set by the doctrine the second it contacted the police and started the mechanism of prosecution in action.

A number of courts have suggested that public school officials be allowed to search on less than probable cause for the purposes of school discipline, but that probable cause be required if the material seized was offered at a criminal trial. (Doe v. Renfrow, 475 F.Supp. 1012, (N.D. Ill. 1979) affd. 631 F.2d 91 (7th Cir. 1980), cert.den. 451

U.S. 1022 [69 L.Ed.2d 395, 101 S.Ct. 3015], Bahr v. Jenkins, 539 F.Supp. 483, 485-486, 488, supra, Jones v. Latexo Independent School District, 690 F.2d 470, 481 fn. 19, supra, Stern v. New Haven Community Schools, 529 F.Supp. 31, 35-36, supra, see also, Comment, Search and Seizure in Public Schools: Are Our Children's Rights going to the Dogs?, 24 St. Louis L.J. 119, 129-130 (1979).)

This approach has also been adopted by the American Bar Association in its Juvenile Justice Standards, Standards Relating to Schools and Education. The American Bar Association Standard on this topic, Standard 8.6 focuses on the intent of the school at the time of the search. Recognizing that this would be the subject of considerable controversy and litigation, the standard creates a presumption that the school official had

the necessary intent if the evidence is offered at the criminal trial, noting that close cooperation with the police is a common occurrence. (Comment to Standard 8.6.)

Although the standard is conceptually valid in that it provides for flexibility in searches by the school officials, the presumption it creates is unnecessary. Any time evidence seized pursuant to a search conducted without probable cause is introduced at a criminal trial, the doctrine of in loco parentis will have been violated. A better rule would be to flatly prohibit the introduction of such evidence at criminal trials. Applying that rule to the case at bench, in order to avoid suppression of evidence at T.L.O.'s trial, the principal would have had to have had probable cause to search her

purse, since the contents were given to the police and juvenile court proceeding were instituted.

III

THE EXCLUSIONARY RULE APPLIES TO ILLEGAL SEARCHES CONDUCTED BY PUBLIC SCHOOL OFFICIALS

Amicus is aware that the two-tiered approached urged herein includes a limited exclusionary rule invoked on different standards depending on the type of proceeding at which the fruits of the search is proffered. There is, however, ample precedent for limited application of the exclusionary rule. (I.N.S. v. Lopez-Mendoza, (1984) ___ U.S. ___, 104 S.Ct. 3479, United States v. Calandra (1974)

A minority of jurisdictions have ruled that public school officials are subject to the Fourth Amendment but that application of the exclusionary rule is

the proper because school officials are not law enforcement officers. (State v. Young, 216 S.E.2d 586, supra, D.R.C. v. State, 646 P.2d 252, supra.) However, as this Court pointed out in Michigan v. Tyler (1978) 436 U.S. 499 there is no requirement that law enforcement be the primary function of a governmental agency in order for exclusionary rule to apply to its searches.

Past decisions of this Court and others contain many examples of non-law enforcement governmental agencies to which the Fourth Amendment and the exclusionary rule apply: fire departments seeking code violations (Camera v. Municipal Court, 387 U.S. 523, supra, See v. City of Seattle, 387 U.S. 541, supra)), county welfare workers searching for evidence of eligibility (Parrish v. Civil Service Commission, 66 Cal.2d

260, 57 Cal.Rptr. 623, 425 P.2d 223 (1967), searches for pests by state agricultural inspectors (Vidaurri v. Superior Court, 13 Cal.App.3d 550, 91 Cal.Rptr. 704, (1970) searches of first class mail by a postman (People v. Superior Court (Flynn), 275 Cal.App.2d 489, 79 Cal.Rptr.904 (1969)), inspectors for the Occupational Health and Safety Administration (Marshall v. Barlow's Inc. (1978) 436 U.S. 307, Salwasser Manufacturing Co. v. Municipal Court, 94 Cal.App.3d 223, 156 Cal.Rptr.292 (1979)) and I.R.S. agents conducting a tax levy (G.M. Leasing Corporation v. United States, 429 U.S. 338. Thus, it is clear that the exclusionary rule applies to any agency of the government conducting a search resulting in criminal prosecution.

The application of the exclusionary

rule is based on two considerations: deterrence of constitutional violations and the avoidance of judicial participation in illegal conduct by other government bodies. (United States v. Calandra (1974) 414 U.S. 338. The traditional test for the application of the exclusionary rule is whether the party involved would be deterred from committing unlawful searches and seizures by application of the rule.

Alternatives to the exclusionary rule are one factor to be considered. Generally, there are two federal remedies which are employed in cases involving unlawful searches and seizures: civil rights actions pursuant to 42 U.S.C. 1983 and actions for damages under the Fourth Amendment pursuant to the authority of Bivens v. Six Unknown Federal Narcotics Agents (1971) 403 U.S. 388.

Although these actions rest on different bases they are treated similarly by the courts, except that a Bivens type action is limited to federal officials. (Rodriguez v. Ritchey, 539 F.2d 394 (5th Cir. 1976); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974).) Good faith is a complete defense to both types of actions and the plaintiff must prove malicious intent, rather than a mere lack of probable cause, to prevail on either. These restrictions have been applied to 42 U.S.C. 1983 actions against school officials. (Wood v. Strickland (1975) 420 U.S. 308. The court in Morale v. Grigel, supra, 422 F.Supp. 988 examined these restrictions and concluded:

> ". . .the Supreme Court has left students basically remediless in the Federal Courts for violations of their Fourth Amendment rights." (422 F.Supp.

1001.)

In Jones v. Latexo Independent School District, 499 F.Supp. 223, supra, the court cited the lack of any effective federal civil remedy as the basis for imposing the exclusionary rule in disciplinary cases.

The limitations which this restriction places on a civil remedy to unlawful searches on school grounds is vividly demonstrated by two of the cases which have applied it in that context. In both Doe v. Renfrow, supra, and Bilbrey v. Brown, supra both plaintiffs were initially denied relief on the grounds that the school officials, who had been found to have acted illegally, were immune under the rule of Wood v. Strickland. In the Court of Appeal, both students were granted relief, but only to the extent that they were damaged by

the nude strip searches to which they were ultimately subjected. Thus, one could be left with the impression that civil remedies may deter strip searches only. Certainly, the privacy protection of the Fourth Amendment is not limited to a mere prohibition on strip searches.

While there have been cases which have declined to apply the exclusionary rule to school personnel (e.g., D.R.C. v. State, 646 P.2d 252, supra), no case has ever suggested that public school personnel would not be deterred by application of the exclusionary rule. In fact, the cases which have addressed the issue have uniformly found that the goals of the exclusionary rule are served by application of the exclusionary rule. In referring to the employment of the exclusionary rule in state college disciplinary/expulsion proceed-

ings, the court in Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975) noted:

> "If there were no exclusionary rule. . ., the. . .authorities would have no incentive to respect the privacy of its students. . . . Where, as here, the authorities who violated the Constitution were not demonstrably guilty of bad faith, the exclusionary rule remains the only possible deterrent, the only way to positively encourage respect for the constitutional guarantee." (398 F.Supp. 794.)

This same rule, for the same reasons, has been applied to searches at public high schools. (Caldwell v. Cannady, 340 F.Supp. 835, 839-840 (1972); Jones v. Latexo Independent School District, 499 F.Supp. 223, 238-239 supra.)

The simple fact is that the law should discourage illegal invasions of students' privacy rights by public school officials acting under color of state law. As noted above, civil remedies have

been limited to the point that they appear to extend to only the most aggregious conduct and, experience has shown, as demonstrated in the reported cases, such civil remedies do not act as a deterrent to unlawful invasions of students' privacy. Neither petitioner nor the amici in support of petitioner's position seem to dispute this. Petitioner also fails to suggest an appropriate remedy for violation of students'privacy rights.

It cannot be seriously argued that public school officials will be unaware of the application of the exclusionary rule to school searches. It appears that most school districts maintain a search and seizure policy (see Knowles, Crime Investigation in the School: Its Constitutional Dimensions (1964) 4 Journal of Family Law 151) and constitutional

limitations on searches and seizures are the subjects of articles in professional journals. (See Comment: The Fourth Amendment and High School Students, 6 Williamette Law Review 567 (1970).

The second rationale for the imposition of the exclusionary rule, judicial integrity, is both important and relevant in this context. The school search situation is not the typical "private person" search in that it involves concerted action by one unit of the government, the schools, aiding another, the police. In this respect it is similar to the "silver platter doctrine" cases in which this Court ruled that governmental officials who violate a citizen's rights may not escape the operation of the exclusionary rule by merely presenting illegally seized evidence to governmental officials in another jurisdiction.

(Elkins v. United States, 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960); Silverthorn Lumber Co. v. United States, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182 (1920), see also, Note: Search and Seizure in the Public Schools, 36 Louisiana State L.R. 1067, 1071 (1976).) It would be contrary to both the language and policy of the constitutional limitations on searches and seizures to allow public school officials, clearly governmental agents, to seize evidence in a manner which would be illegal for the police and then present it to the police and have it admissible in court.

CONCLUSION

As often happens in matters involving major constitutional questions, the case in the matter at bench has been consumed by the issue. The true issue in this case is not whether public

school officials may legally search students on less than probable cause to effect intramural discipline nor is it whether the state, through its public schools, maintains a property interest in desks and lockers sufficient to allow searches of those objects. Rather, the question presented by the facts of this case is whether public school students surrender their constitutional protections against being prosecuted for criminal offenses based on evidence seized in warrantless searches of their persons based on less than probable cause merely because they comply with their legal responsibility to attend school. T.L.O. is before this Court because a New Jersey court found that she committed a criminal violation making her a juvenile delinquent. Therefore, the focus of discussion is the standard to be applied

to criminal or quasi-criminal delinquency proceedings.

Yet, the underlying question posed by this case transcends any rule which this Court may fashion for the admissibility of evidence in criminal or quasi-criminal cases. This Court is truly deciding an issue which will determine the nature of our public schools for years to come. Are schools to become areas where the rights guaranteed by the Constitution are suspended or are they an extension of our society wherein student-citizens are treated with dignity and respect? What are the lessons to be taught in public school; are our citizens to be taught that that the values which have led our nation to unparalleled greatness in its two-hundred year history can be denied to the few who are unrepresented and,

essentially, voiceless in deciding on national leadership? Have we, as a nation, learned nothing from the damage caused by past efforts to deny the protections of the constitutional to members of our society? (See, E.g., Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).)

Ironically, New Jersey, like many states, requires that public school students be instructed in the content and meaning of the United States Constitution as part of their school curriculum. (N.J.S.A. 18A:6-3. See also Cal.Ed. Code § 44806.) Yet the State of New Jersey is now arguing to this Court that a rule should be fashioned denying those very students one of the most cherised of personal rights --the right to be free from governmental invasion of personal privacy. This is a classic

example of sending the message to public school students that they should believe as the government says and ignore what it does. As Justice Brennan so eloquently stated in his dissent from the denial of certiorari in Doe v. Renfroe, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981):

> "We do not know what class petitioner was attending when the [search occurred], but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is

> being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."

This Court must actually address two issues in this case: the definition of the Fourth Amendment privacy rights of public school students as a whole and the formulation of rules regarding the admissibility of evidence seized by governmental officials employed by public school districts in criminal or quasi-criminal cases which are instituted distinct from school discipline proceedings. Amicus urges this Court to rule that the protections of the Fourth Amendment apply to school campuses and to adopt flexible standard which will allow school officials to take disciplinary action against

students on evidence seized with a "reasonable suspicion" of wrong doing yet that will also recognize that criminal or quasi-criminal proceedings involve a greater interest and therefore may be pursued only if the proffered evidence was seized with probable cause.

Respectfully submitted,

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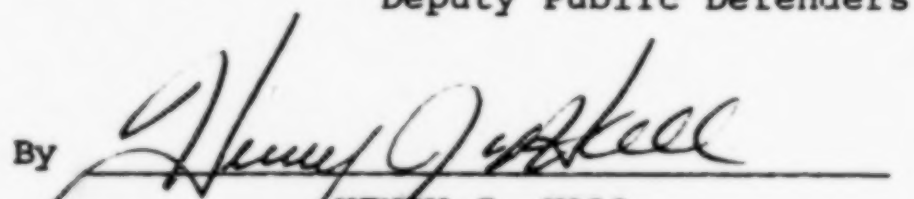
By 

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